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NO. 85-1918

in the Supreme Court of the United States

October Term, 1985

L.B.G. PROPERTIES, INC.,

Petitioner

vs.

CHISHOLM REALTY COMPANY, LTD.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Does a court of appeals have jurisdiction under 28 U.S.C. §158(d) to review a district court decision which reverses a bankruptcy court order confirming a Chapter 11 plan of reorganization and remands the proceeding to the bankruptcy court for further consideration?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The respondent Chisholm Realty Company, Ltd. ("Respondent"), a secured and unsecured creditor of the Debtor-in-Possession L.B.G. Properties, Inc. ("Petitioner"), respectfully submits this its Brief in

Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit, entered in the proceeding below on November 26, 1985, is not reported and is reprinted in the Petitioner's Appendix to Petition, pet. App. 1. The decision of the Court of Appeals for the Eleventh Circuit on Motion for Reconsideration, rehearing denied on February 19, 1986, is not reported and is reprinted in the Petitioner's Appendix to the Petition, pet. App. 2.

The decisions of the United States District Court for the Southern District of Florida and of the United States Bankruptcy Court for the Southern District of Florida are unreported and are reprinted in the Petitioner's Appendix to the Petition, pet. App. 3, pet. App. 5, pet. App. 9, and pet. App. 15.

JURISDICTION

The Respondent notes that the Bankruptcy Court confirmed the Petitioner's Second Modified Plan of Reorganization and that, thereafter, the Respondent appealed to the District Court. See pet. App. 5; see also pet. App. 3. On appeal, the District Court did not simply reverse the Bankruptcy Court's confirmation order but by "Order of Remand," remanded the confirmation proceedings to the Bankruptcy Court for further consideration of that portion of the plan relating to the provision of the indubitable equivalent of the allowed amount of Chisholm's secured claim.

Other than the above-noted clarifications, the Respondent has no objection to the Petitioner's jurisdictional statement.

STATEMENT OF THE CASE

With the exception of certain unnecessarily argumentative language contained therein, the Respondent has no substantial objection to the Statement of the Case submitted by the Petitioner. The Appendix portion of the Petitioner's Petition contains the pertinent lower court orders, which, in their aggregate, supply this Court with sufficient information upon which to reach a just and proper resolution of this matter. The argumentative suggestions made by the Petitioner that the Respondent's objections to the Plan of Reorganization were unfounded and that the District Court's treatment of this matter was cryptic and unexplained do not find any support whatsoever in the record presented by Petitioner in the Appendix to its Petition. The District Court's Order of Remand is clear and concise in its requirement that the Bankruptcy Court give further consideration to the position of Chisholm, as an impaired creditor, by way of a reexamination of the indubitable equivalent provisions of the plan. See pet. App. 3. The objections of Chisholm, the Respondent herein, stem, in substantial part, from the fact that under the plan, as modified, the Respondent is subject to the cramdown provisions of 11 U.S.C. §1129(b)(1). It is a rare creditor, indeed, who does not oppose a plan of reorganization, when such creditor is subject to the severe provisions of the cramdown. See pet. App. 13.

REASONS FOR DENYING THE WRIT

I.

THE ELEVENTH CIRCUIT'S VIEW OF ITS JURISDICTION IN BANKRUPTCY APPEALS IS PRUDENT, FOSTERS THE EFFICIENT ADMINISTRATION OF BANKRUPTCY CASES, AND NOW REPRESENTS THE PREVAILING VIEW AMONG THE CIRCUITS.

The petitioner filed its Voluntary Petition for Relief under Chapter 11 of Title 11 U.S.C, on July 22, 1983. On February 22, 1984, the Bankruptcy Court confirmed the Petitioner's Second Modified Plan of Reorganization, subject to certain conditions subsequent and over the objections of Respondent. See pet. App. 7.

The Respondent appealed the Bankruptcy Court's Order of Confirmation to the District Court and, upon consideration of the appeal, the District Court entered an "Order of Remand" directing that the cause be remanded to the Bankruptcy Court for further consideration. See pet. App. 3. At the heart of the District Court Order of Remand was the directive that the Bankruptcy Court reconsider the critical factual and legal issue of indubitable equivalence, as contemplated by Section 1129 of the Bankruptcy Code and as that issue pertained to the secured claim of Respondent, an impaired creditor subject to the cramdown provisions of 11 U.S.C §1129(b)(1). See pet. App. 3 and pet. App. 13.

Subsequently, the Petitioner sought appeal before the United States Court of Appeals for the Eleventh Circuit. On November 26, 1985, the Eleventh Circuit

dismissed the appeal on authority of *TCL Investors v. Brookside Savings & Loan Association*, 775 F.2d 1516 (11th Cir. 1985).

The Petitioner has attacked, with a vengeance, the Eleventh Circuit decision of *TCL Investors*. In Part I of the Petition, the Petitioner suggests that *TCL Investors* conflicts with decisions of other circuit courts of appeals and attempts to portray *TCL Investors* as little more than an aberration. In Part II of the Petition, the Petitioner retracts its suggestion that *TCL Investors* represents an aberration and presents *TCL Investors*, not as an aberrational decision, but as reflecting the Eleventh Circuit's internally confused and inconsistent concept of its jurisdiction.

The Order of Remand of the District Court remands the confirmation proceedings to the Bankruptcy Court for a reconsideration of critical factual and legal issues, not purely legal issues and, most certainly, not ministerial determinations. The Eleventh Circuit Court of Appeals rightly dismissed this appeal on authority of *TCL Investors*, *supra*.

In *TCL Investors*, the District Court reversed the Bankruptcy Court's order which directed the Chapter 11 debtor, TCL Investors, to sell certain property to Brookside Savings & Loan. The District Court remanded the case on the grounds that the Bankruptcy Court must conduct an adversary proceeding (see Bankruptcy Rule 7001) in order to grant the relief requested by Brookside. On appeal to the Eleventh Circuit Court of Appeals, the Circuit dismissed the appeal for lack of jurisdiction under 28 U.S.C. §158(d). *TCL Investors*, 775 F.2d at 1517. The Eleventh Circuit held "that the district court's remand

required significant judicial activity by the bankruptcy court involving considerable discretion and therefore was not finally dispositive of the merits of the case." 775 F.2d at 1518. The Eleventh Circuit noted the difference between an order which merely affirms or reverses a lower court order and one that reverses *and remands* for further factual development, or "significant judicial activity." *Id.* at 1518–1519. In *TCL Investors* the order of remand of the District Court did not fall within the definition of a final order as "'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' *In re Tidewater Group, Inc.*, 734 F.2d 794, 795–796 (11th Cir. 1984), quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945)." Id. at 1519.

The holding of *TCL Investors*, that an order of remand which requires significant judicial activity and discretion by the trial (bankruptcy) court is not a final order and, therefore, not appealable under 28 U.S.C. §158(d), now represents the prevailing view among the circuits. And, in the case at bar, one can think of few issues in a Chapter 11 confirmation proceeding which require more significant judicial activity than the reconsideration of the issues of the indubitable equivalent under 11 U.S.C. §1129(b)(2)(A)(iii) and the cramdown provisions of 11 U.S.C. §1129(b)(1). See also, generally, *In re Murel Holding Corp.*, 75 F.2d 941 (2d Cir. 1935) (Learned Hand).

An examination of recent decisions from various circuit courts of appeals discloses that the Eleventh Circuit's view of its jurisdiction is in harmony with the prevailing view among the circuits. The characterization

of the Eleventh Circuit's view as an aberration is inaccurate and is predicated on a misreading or nonreading of decisions from other circuits. The remainder of Part I of this brief examines the law of the circuit courts of appeals.

The First Circuit Court of Appeals in *In re Saco Local Development Corp.*, 711 F.2d 441 (1st Cir. 1983), on a direct appeal to the Court of Appeals from the Bankruptcy Court, concluded that a bankruptcy court order allowing a claim of priority payment constituted a final judgment, order, or decree under 28 U.S.C. §1293(b), because that order conclusively determined the respective rights of the parties to a separate and discrete controversy. 711 F.2d at 445–446. Acknowledging that bankruptcy cases are inherently multiparty proceedings, the First Circuit also recognized that, within a bankruptcy case, there may be controversies "which stand sufficiently apart from the rest of the litigation to warrant treating an order which resolves [that controversy] as 'final' and appealable." *Id.* at 444. *Saco Local Development* does not support the position of the Petitioner because the order involved in that case resolved a separate and discrete controversy. Furthermore, the appeal in *Saco Local Development Corp.* was a direct appeal from the Bankruptcy Court to the Court of Appeals by agreement of the parties and, hence, did not involve the reversal and remand to a bankruptcy court by an intermediate appellate court.

The Petitioner has not cited a decision from the Second Circuit Court of Appeals on the finality of bankruptcy appeals and Respondent's research has not disclosed a decision from that circuit which would shed further light on this petition.

The citation by the Petitioner to the Third Circuit Court of Appeals decision, *Matter of Marin Motor Oil, Inc.*, 689 F.2d 445 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983) is misplaced. In *Marin Motor Oil*, the Bankruptcy Court entered an order declaring that a creditors committee did not have the right to intervene in a bankruptcy, adversary proceeding. The District Court reversed this order and the Third Circuit Court of Appeals affirmed, holding that a creditors committee in a bankruptcy reorganization does have the right to intervene in an adversary proceeding instituted by a bankruptcy trustee. 689 F.2d at 446. The Third Circuit, which declared that an order granting intervention is ordinarily not a final order appealable as of right, assumed jurisdiction over the appeal under the rationale that a reversal of the District Court's order by the Circuit Court would effectively preclude the committee from further participation in the adversary proceeding. *Id.* at 448.

Marin Motor Oil, Inc. cannot be read as expansively as the Petitioner suggests. The Third Circuit expressly stated that it was "reluctant... to adopt an expansive interpretation of finality." *Id.* at 448. The Circuit stated: "But it is important to stress the limited nature of our holding on jurisdiction. We hold only that when the bankruptcy court issues what is indisputably a final order, and the district court issues an order affirming or reversing, the district court's order is also a final order for purposes of Section 1293(b)." *Id.* at 449. The Third Circuit did not address a situation of a reversal and remand for further consideration.

The Petitioner has not cited any decision from the Fourth Circuit Court of Appeals and the research of the

Respondent has not disclosed a significant decision from that Circuit on the issue presented.

The Fifth Circuit's view of its jurisdiction is entirely consistent with that of the Eleventh Circuit. See, *TCL Investors*, 775 F.2d at 1518, citing *In Re Emerald Oil Company*, 694 F.2d 88, 89 (5th Cir. 1982). The view of the Fifth Circuit Court of Appeals of finality of bankruptcy appeals was initially expressed in the Circuit's leading decision, *In re Emerald Oil Company*, 694 F.2d 88 (5th Cir. 1982), in which the Fifth Circuit dismissed an appeal taken from the District Court, which had reversed the Bankruptcy Court's award of summary judgment in favor of a creditor. The Court of Appeals ruled that the reversal by the District Court did not constitute a final judgment but, in effect, returned the proceeding to the Bankruptcy Court for a final determination of the rights of the parties. 694 F.2d at 89.

In *In re Barrier*, 776 F.2d 1298 (5th Cir. 1985), the Bankruptcy Court had confirmed a debtor's plan of reorganization over the objection of a creditor bank. The District Court denied a stay pending appeal of the Bankruptcy Court's Order. The Fifth Circuit declared that the District Court decision to deny the stay pending appeal was not a final order and cited, inter alia, the Eleventh Circuit decision, *In re Regency Woods Apartment, Ltd.*, 686 F.2d 899, 901 (11th Cir. 1982). 776 F.2d at 1299. The Court of Appeals did, however, issue a mandamus to the District Court, on a finding that there was serious potential for irreparable harm to the objecting creditor. *Id. Barrier* is entirely consistent with the decision by the Eleventh Circuit in this case. There is no issue here of irreparable harm, and certainly no showing of such. The effect of the

Order of Remand by the District Court is that the status quo can be maintained pending further consideration by the Bankruptcy Court on confirmation of Petitioner's plan.

The Petitioner has not pointed out a decision from the Sixth Circuit Court of Appeals and Respondent's research has not disclosed an opinion of significant bearing from that Circuit.

The leading decision from the Seventh Circuit Court of Appeals on the finality of bankruptcy appeals is *Matter of Riggsby*, 745 F.2d 1153 (7th Cir. 1984), which the Petitioner has failed to cite to this Court in its Petition. In *Riggsby*, the District Court reversed a Bankruptcy Court dismissal of a creditor's complaint objecting to discharge of the debtor and remanded the case for further proceedings. The appeal by the debtor was dismissed by the Seventh Circuit, which declared that "[a]lthough the order of the bankruptcy judge rejecting the bank's complaint...was final within the meaning of the appeal statute, we have jurisdiction of the district court's order reversing the bankruptcy judge only if that order was final too." 745 F.2d at 1155. The Seventh Circuit noted, moreover, that "the majority of circuits hold, very sensibly in our view, that remands by the district court to the bankruptcy judge are not appealable in cases such as the present where the bankruptcy judge is the decider, and not just the recommender of the decision. [Citations omitted]." Id.

The Seventh Circuit, in *Riggsby*, took into account the fact that most proceedings in bankruptcy cases "are summary, remands usually take little time to complete and it is therefore more efficient to wait" until the remand is

concluded. *Id.* at 1155–1156. The view of the Seventh Circuit fosters efficient administration of bankruptcy cases in that, depending on the outcome of the remand, "there might be no appeal at all, and in any event there would be no chance of two appeals -- one from the order of remand and the other from whatever order the district judge entered on appeal from the bankruptcy judge's final decision following remand." *Id.* at 1156. In language strikingly similar to the language appearing in the Eleventh Circuit's decision of *TCL Investors, supra,* at 1518, the Seventh Circuit held "that a decision of the district court on appeal from a bankruptcy judge's final order is not itself final if the decision remands the case to the bankruptcy judge for significant further proceedings." 745 F.2d at 1156.

Three other decisions from the Seventh Circuit warrant brief comment. First, *Matter of Madison Hotel Associates*, 749 F.2d 410 (7th Cir. 1984), cited by the Petitioner, did not address the issue of finality of bankruptcy and district court orders and, accordingly, does not provide authority for consideration on the instant petition. Second, in *Matter of Cash Currency Exchange, Inc.*, 762 F.2d 542 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 233 (1985), the Seventh Circuit addressed the question of whether six different orders entered by the Bankruptcy Court and appealed to the District Court were final orders or not. A common thread running throughout the *Cash Currency Exchange* opinion was the distinction between the adversary proceeding, which constitutes a separate and discrete controversy with a defined plaintiff and a defined defendant, on the one hand, and the broader, multiparty Chapter 11 case, which requires a consideration of multiple interests. See 762 F.2d at 546. Importantly, the Seventh Circuit declared that "a district court's decision on

an appeal from a bankruptcy court's final order will be reviewed only if it also is final. *Riggsby*, 745 F.2d at 1155. Thus, an order by the district court remanding the case to the bankruptcy court for further significant proceedings will not be automatically and immediately appealable to this court, provided the order may be effectively reviewed on appeal from the bankruptcy court's 'final final' decision. Id. at 1156." 762 F.2d at 546.

A recent decision from the Seventh Circuit, *Matter of Barker*, 768 F.2d 191 (7th Cir. 1985), albeit cited by the Petitioner, lends additional support to the position of the Respondent herein. *Matter of Barker* reiterated and reaffirmed the principle that where the district court reverses and remands the given matter for further proceedings, the district court's order remanding the case would not normally be considered a final order or judgment. An order of remand, in the Seventh Circuit's view, would not be final unless "all that remained to be done on remand was a purely mechanical, computational, or minsterial task that was unlikely to result in a new appeal or to effect issues that the losing party might want to raise on appeal following the remand." 768 F.2d at 193. See also, *Matter of Fox*, 762 F.2d 54, 55-56 (7th Cir. 1985)

Although the Petitioner has cited the Eighth Circuit decision, *In re Bestmann*, 720 F.2d 484 (8th Cir. 1983), the Petitioner has omitted to bring to the attention of this Court the leading decision of the Eighth Circuit, *Matter of Hansen*, 702 F.2d 728 (8th Cir. 1983), *cert. denied*, 103 S.Ct. 3539 (1983). *Bestmann* presented the Eighth Circuit with a separate and distinct controversy between designated parties to an adversary proceeding. The Eighth

Circuit declared that the order of the trial (bankruptcy) court was a final order that completely disposed of the complaint and finally determined the rights of the parties to the adversary proceeding and that, accordingly, the District Court erred in dismissing an appeal taken from the Bankruptcy Court order. In *Bestmann*, the Eighth Circuit ruled that the Bankruptcy Court's order finding that the defendant bank, not the plaintiff Bayer, was entitled to proceeds from the sale of hogs was a final, conclusive order. *Id.* at 486. On the other hand, the Eighth Circuit, in *Matter of Hansen*, confronted a situation more analogous to the one presented by this Petition. *Hansen* held that District Court orders of remand are not final, automatically appealable orders. 702 F.2d at 729.

The Ninth Circuit has perhaps generated the most controversy in the area of finality of bankruptcy appeals. More importantly, the Ninth Circuit, in a line of several decisions, seems to have come full circle on the issue of finality. Through its discussion of only three of the six decisions from the Ninth Circuit, the Petitioner has presented this Court with only half the circle.

Brief note may be taken first of *Matter of Brissette*, 561 F.2d 779 (9th Cir. 1977) which held that exemption disputes in bankruptcy cases constitute proceedings from which interlocutory appeals may be taken. *Brissette* is, however, a decision rendered under the Bankruptcy Act of 1898, as amended; specifically, the appellate jurisdictional provisions of that Act (see 11 U.S.C. §47(a)) and, hence, does not require extended comment.

The full circle evidenced in the Ninth Circuit decisions appears to begin with *In re Martinez*, 721 F.2d

262 (9th Cir. 1983). In *Martinez*, a Bankruptcy Appellate Panel affirmed, in part, the order of the Bankruptcy Court but remanded the case for further, factual determinations. The Ninth Circuit Court of Appeals dismissed the appeal holding that the remand by the Bankruptcy Appellate Panel to the Bankruptcy Court for clarification of a central issue to the case did not constitute a final decision appealable as of right. As the Ninth Circuit declared in *Martinez*: "Courts have traditionally not considered remands as final decisions because of their preference to have a single 'ultimate review on all the combined issues.' [citations omitted]." 721 F.2d at 265. Quoting this Court's definition of a final decision, as "one which 'ends the litigation on the merits and leaves nothing for the court to do but enter judgment. *Catlin v. United States*, 324 U.S. 229, 233, 65 S.CT. 631, 633, 89 L.Ed. 911 (1945)," the *Martinez* decision recognized that "[t]he finality doctrine is based on the twin policies of controlling piecemeal adjudication and eliminating the delays caused by the appeal of interlocutory decisions. [Citations omitted]." 721 F.2d at 265. The issue on remand, in *Martinez*, being the determination of the form of tenancy to the debtors' homesteaded residence was as critical and central an issue to the determination of the rights of the parties as the remanded determination of indubitable equivalence in the case at bar.

In *In re Sambo's Restaurant, Inc.*, 754 F.2d 811 (9th Cir. 1985), the Ninth Circuit assumed jurisdiction over an appeal and affirmed the District Court order which reversed the Bankruptcy Court order denying a motion to amend an informal proof of claim. The Ninth Circuit focused not on the District Court's disposition of the matter but on the Bankruptcy Court's order denying the motion to amend and considered that Court's order a final

judgment because it effectively resulted in the dismissal of the entire claim made. *Id.* at 813.

Three months following *Sambo's Restaurants*, the Ninth Circuit reviewed a decision by the District Court, which had vacated and remanded to the Bankruptcy Court a bankruptcy court order of confirmation. See *Matter of Pizza of Hawaii, Inc.*, 761 F.2d 1374 (9th Cir. 1985). In *Matter of Pizza of Hawaii, Inc.*, it is important to note that two substantive issues were inextricably tied together, and this, undoubtedly, had an impact on the determination as to whether the Ninth Circuit should assume jurisdiction. The two substantive issues were whether the plan proposed by the debtor was feasible and, in that regard, whether a certain creditor had filed sufficient and proper documents to constitute an amendable, informal proof of claim to be considered on the question of feasibility. The Bankruptcy Court had confirmed the Chapter 11 debtor's plan, but the District Court vacated and remanded confirmation because the informal claim of the creditor had not been considered by the Bankruptcy Court on confirmation. Ultimately, the Ninth Circuit affirmed the District Court's order vacating confirmation of the plan and remanding for reconsideration of the plan's feasibility. *Id.* at 1382.

The full circle in the Ninth Circuit is completed by two, more recent cases, *In re Stanton*, 766 F.2d 1283 (9th Cir. 1985) and *In re 405 N. Bedford Dr. Corp.*, 778 F.2d 1374 (9th Cir. 1985). With its decision in *In re Stanton*, the Ninth Circuit Court of Appeals has finally and clearly adopted a concept of finality and appellate jurisdiction more in line with other circuit courts of appeals. In *Stanton*, the Court declared, in straightforward terms, "that the finality issue must be examined at two levels..., first,

to see whether the order of the bankruptcy court was final [citations omitted], and second, to whether the decision of the BAP [or district court] is final, [citations omitted]. Both decisions must be final." 766 F.2d at 1285. The view expressed by the *Stanton* Court is entirely in accord with the Eleventh Circuit Court of Appeals view and comprises a significant departure from the broad declarations of *Sambo's Restaurants, Inc.* and *Pizza of Hawaii, Inc.* Notwithstanding the attempt on the part of the Ninth Circuit to reconcile the positions taken in the earlier decisions of *Sambo's*, on the one hand, and *Martinez*, on the other hand, the Ninth Circuit has now come full circle to follow the *Martinez* decision. See, *In re Riggsby, supra*, at 1155; see also, *TCL Investors, supra*, at 1518–1519.

Most recently, in *In re 405 N. Bedford Corp.*, 778 F.2d 1374, an appeal was taken from the District Court order which affirmed a bankruptcy court's order resolving two motions. The appeal to the Ninth Circuit was dismissed on the grounds that where "further proceedings in the bankruptcy court will affect the scope of the order, the order is not subject to review in this court under [section 158]. 778 F.2d at 1377. See also, *In re Four Seas Center, Ltd.*, 754 F.2d 1416, 1418, (9th Cir. 1985).

Finally, the Tenth Circuit Court of Appeals, in a decision rendered prior to publication of the Ninth Circuit's *Stanton* decision, has recently adopted the view that a "decision of the district court on appeal from a bankruptcy judge's final order is not itself final if the decision remands the case to the bankruptcy judge for significant further proceedings...." *Matter of Commercial Contractors, Inc.*, 13 B.C.D. 691, 692 (10th Cir. 1985),

quoting *In re Riggsby*, 745 F.2d at 1156. In *Commercial Contractors, Inc.*, the District Court, on appeal from the Bankruptcy Court, reversed the lower court order denying a motion to intervene, vacated the Bankruptcy Court approval of a settlement and remanded the matter to the Bankruptcy Court. The appeal was dismissed by the Tenth Circuit, which concluded that an order of remand is not a final order and, therefore, appellate jurisdiction does not obtain. 13 B.C.D. at 692-693.

The Petitioner has not cited any pertinent decisions from the District of Columbia Circuit Court of Appeals and Respondent's research has not revealed any.

The decisions from various circuit courts of appeals on the finality issue of bankruptcy appeals discloses a substantial harmony among the circuits. The courts appear cognizant of the fact that proceedings in bankruptcy are normally summary and remands take little time. *See, e.g., Commercial Contractors, Inc., supra*, at 692. The decisions, moreover, and at least tacitly, recognize that in the absence of a clearly defined, separate controversy, such as an adversary proceeding, events subsequent to an appeal in a bankruptcy case may frequently outrun the original issues in the initial appeal due to the unique nature of bankruptcy cases, which are inherently multiparty, multifaceted proceedings. *See, e.g., Cash Currency Exchange, Inc., supra*, at 545-546; *see also, generally, Hadley v. Victory Construction Company, Inc.*, 11 B.C.D. 749, 753 (BAP 9th Cir. 1984). The rule that both the trial court and the intermediate appellate court decisions must be final in order to maintain an appeal under 11 U.S.C. §158(d) fosters the policies of eliminating delay and of controlling piecemeal litigation and reflects

the wisdom of the circuits that, depending on the outcome of a remand, there may be no appeal at all or, in any event, not two appeals. *See, Riggsby, supra*, at 1156. Judicial economy is well served.

II.

THE DECISION BELOW REPRESENTS THE ELEVENTH CIRCUIT'S COHERENT AND CONSISTENT CONCEPT OF ITS JURISDICTION.

The Eleventh Circuit decision, *In re TCL Investors*, 775 F.2d 1516, is consistent with previous decisions from the Eleventh Circuit, which, in the aggregate, constitute a coherent concept of appellate jurisdiction. The law of the Eleventh Circuit, as initially expressed in *In re Regency Woods Apartments, Ltd.*, 686 F.2d 899 (11th Cir. 1982) and most recently expressed in *In re TCL Investors, supra*, is that where a district court's remand requires "significant judicial activity" by the bankruptcy court involving considerable discretion, the district court's order is not final, but interlocutory, and not appealable as of right under Section 158(d). In *Regency Woods Apartments, Ltd.*, the District Court reversed a Bankruptcy Court order and remanded the case to the Bankruptcy Court with directions to give further consideration to the issues presented, i.e., adequate protection and an accounting for post-petition use of cash collateral. 686 F.2d at 902. In *TCL Investors*, the Eleventh Circuit held that the District Court's order reversing and remanding the case to the Bankruptcy Court for further proceedings on an order of the Bankruptcy Court, which had directed the debtor to sell certain property, was not a final order. Rather, the District Court's order required significant judicial activity by the Bankruptcy Court. 775 F.2d at 1519.

In the case at bar, significant judicial activity by the Bankruptcy Court is required by the District Court's Order of Remand, as well. The District Court's Order of Remand, far from resolving the merits and far from leaving nothing more for the Bankruptcy Court to do than to execute judgment directs the Bankruptcy Court to give further and considerable reconsideration to the question of providing the Respondent with the indubitable equivalent of its allowed secured claim. See *TCL Investors*, 775 F.2d at 1519.

Because the District Courts in *Regency Woods Apartments, supra,* and *TCL Investors, supra,* reversed and remanded for further consideration, the Eleventh Circuit Court of Appeals dismissed the appeals in both decisions. Similarly, in *Matter of Wisz*, 778 F.2d 762 (11th Cir. 1985) and in *In re The Charter Company*, 778 F.2d 617 (11th Cir. 1985) the appeals to the Eleventh Circuit were dismissed on jurisdictional grounds. To the extent that *Wisz, supra,* and *Charter Company, supra,* have any bearing on the petition at the bar, those two decisions are entirely consistent with the Eleventh Circuit's view of its jurisdiction expressed in *Regency Woods Apartments, supra,* and *TCL Investors, supra.* The Eleventh Circuit's view of finality in bankruptcy appeals, and its decision in this case, is in complete harmony with the prevailing view among the circuits and is internally consistent law.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing counsel of record in the foregoing matter with three copies of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit by forwarding copy of same by U.S. Mail, with adequate postage thereon, addressed to:

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This 18th day of June, 1986.

Edwin Marger